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BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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JUN 6 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re)

Amendment of Section 73.202(b),)

Table of Allotments)

FM Broadcast Stations)

(Willows and Dunnigan, California))

MM Docket No. 94-29

RM-8416

TO: Chief, Policy and Rules Division
Mass Media Bureau

**COMMENTS IN OPPOSITION TO
NOTICE OF PROPOSED RULE MAKING**

Dennis J. Kelly

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June 6, 1994

KZSA BROADCASTING, INC.

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SUMMARY

KZSA Broadcasting, Inc. opposes the reallocation of FM Channel 288 from Willows, California to Dunnigan, California on the following grounds:

- The reallocation would violate the law and policy stated in **FM Table of Allotments, Eatonton and Sandy Springs, Georgia**, 6 FCC Rcd 6580 (1991);
- The reallocation would deprive Willows, California of its only operating full-time broadcast allotment; and
- The reallocation would otherwise violate the case law pursuant to 47 U.S.C. §307(b) by reallocating the only FM channel licensed to a county seat of some 6,000 persons in a rural county in the Upper Sacramento River Valley to a place of dubious community characteristics located in the Sacramento Metropolitan Statistical Area (MSA).

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**COMMENTS IN OPPOSITION TO
NOTICE OF PROPOSED RULE MAKING**

KZSA Broadcasting, Inc., licensee of FM Broadcast Station KZSA, Placerville, California (KZSA), by its attorney, and pursuant to the **Notice of Proposed Rule Making (NPRM)** in the above-entitled matter, DA 94-306, 59 Fed. Reg. 18774, released April 15, 1994, hereby respectfully submits these Comments opposing the reallocation of FM Channel 288 from Willows, California to Dunnigan, California. In support whereof, the following is shown:

Preliminary Statement

1. KZSA opposes the reallocation of FM Channel 288 from Willows to Dunnigan on the following grounds:

- The reallocation would violate the law and policy stated in **FM Table of Allotments, Eatonton and Sandy Springs, Georgia**, 6 FCC Rcd 6580 (1991);

- The reallocation would deprive Willows, California of its only operating full-time broadcast allotment; and
- The reallocation would otherwise violate the case law pursuant to 47 U.S.C. §307(b) by reallocating the only FM channel licensed to a county seat of some 6,000 persons in a rural county in the Upper Sacramento River Valley to a place of dubious community characteristics located in the Sacramento Metropolitan Statistical Area (MSA).

**Sandy Springs Requires
Denial of the Proposed Reallocation**

2. This case appears to be similar in many significant respects with the facts and circumstances in ***Sandy Springs***, *supra*. First, the proponents of the reallocation¹ would totally uproot KIQS-FM by moving its transmitter site approximately 75 kilometers (46.5 miles) southeast from rural Glenn County in the upper Sacramento River valley to a point in Yolo County, a county within the Sacramento MSA. As can be seen from the attached map (Exhibit A) prepared by broadcast and communications consultant Leroy C. Granlund of Penryn, California, the proposed reallocation mandates a **100 percent change in coverage area**. Glenn County would cease to receive any service from KIQS-FM. Willows has no other operating FM station or licensed AM station with unlimited hours stated in the station license.²

¹KIQS, Inc. originally filed RM-8416. Since that time it has assigned the license of KIQS-FM, Willows, California to Pacific Spanish Network, Inc. (PSNI).

²KIQS(AM) is licensed to Willows to operate on 1560 kHz with 250 watts, daytime only.

3. In **Sandy Springs**, *supra*, the proponent there (Emerald) proposed to uproot the existing FM station serving Anniston, Alabama and move the transmitter site of that station roughly 100 miles into the Atlanta MSA, thereby causing a complete loss of FM service in the Anniston area. In denying that proposal, the Chief, Mass Media Bureau, wrote:

While Emerald's proposal might result in a superior arrangement of new allotments, there is, however, an important qualitative element of the proposal, the disruption to existing service, which counterbalances this consideration. "That . . . curtailment of service is not in the public interest is axiomatic. Whether or not it may be off-set by concomitant factors is something the Commission should consider". **Hall v. FCC**, 237 F.2d 567 (1956). In **Community Modifications II** [5 FCC 7094 (1990)], the Commission specifically addressed this issue. The Commission stated:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another

5 FCC Rcd at 7097. Moreover, the weight to be accorded the public's expectation is substantial. As the Commission indicated in **Pillar of Fire**, 62 RR 2d 276 (1987), we should not allow a mechanistic application of Section 307(b) of the Communications Act to automatically override our concerns with disruption to existing service.

Sandy Springs, *supra*, 6 FCC Rcd at 6587.

4. Also, the Commission in **Sandy Springs** called the promise of a future allocation in the town to be vacated a

"poor substitute" for existing service. 6 FCC Rcd at 6587. This was consistent with the Commission's policy stated in *Community Modifications II*, *supra*, wherein it was stated (at ¶19):

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to "existing service" occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set.

5. For these reasons, the Bureau denied the reallocation of the FM channel from Anniston, Alabama to Sandy Springs, Georgia.

6. As will be further discussed below, the Dunnigan proponents fail to show that there is a valid reason to distinguish *Sandy Springs* in their case. Indeed, the *NPRM* fails to do so. The result in *Sandy Springs* mandates the denial of the above-captioned proposal.

**Willows' Loss of Its
Only Full-Time Aural Service**

7. Should the amendment to 47 CFR §73.202(b) proposed herein be adopted, Willows, California would lose its only existing full-time aural service, KIQS-FM. Indeed, as demonstrated by Exhibit A hereto, the residents of Willows would be deprived of reception service from KIQS-FM, as the transmitter of that station would be moved some 75 kilometers in the direction of Sacramento.

8. In **FM Assignment Policies and Procedures**, 90 FCC 2d 88, 51 RR 2d 807, 810 (1982), the Commission listed its priorities for allocations to the FM Table of Allotments: (1)first aural service, (2)second aural service, (3)first local service, and (4)other public interest matters. By withdrawing KIQS-FM from Willows and moving it to Dunnigan, the proponents would be depriving Willows of its only local nighttime service.

9. Willows is not an insignificant locality. It is an incorporated city with a 1990 Census population of 5,988. It is the county seat of Glenn County, which has a 1990 Census population of 24,798.³ Glenn County is a rural area dominated by agriculture.

10. The loss by Willows of its only existing full-time local transmission service would be violative of the stated

³Source: **1990 Census of Population and Housing, Summary Population and Housing Characteristics, California, 1990 CPH-1-6.**

law and policy in **Sandy Springs** and **Community Modifications II**, and would therefore be in violation of Section 307(b)'s mandate to the Commission to allocate broadcast frequencies among the states and communities in a fair, efficient and equitable manner. Indeed, the Commission recognized in **Community Modifications II**, at ¶18, that "retention of the sole local service in the rural community would be preferred". The instant proposal would deprive Willows of its sole local service at night. "[P]rovision of first local service is the highest of our allotment priorities which remains unsatisfied. Under these circumstances, we believe a prohibition against the removal of local service is warranted, since such an action could result in diminishment rather than enhancement of local service". *Id.* at ¶16.

**The Dunnigan Proposal Is Nothing More Than a
Purely Technical Manipulation of Section 307(b)**

11. **Dunnigan Is Not a "Community" for Section 307(b) Purposes.** In **Community Modifications II**, at ¶13, the Commission stated that "consistent with precedent, we do not intend to apply the first local service preference of our allotment criteria blindly". It appears, however, that the Dunnigan proponents are counting on the Commission to apply those criteria blindly, for that is the only way that the Commission could allocate Channel 288B1 to Dunnigan.

12. First, Dunnigan is an unincorporated community not listed in the Census. The **NPRM**, at ¶4, appears confused on

this point by making a finding that Dunnigan has "a town hall" and relying on proponents' assertion that Dunnigan has "identifiable boundaries". Proponents did include a copy of the Dunnigan "Master Plan", which was prepared by a Yolo County agency. That plan reveals the following about Dunnigan:

- Dunnigan is unincorporated, with a population estimated at 750 persons;
- Dunnigan consists of an "old town", which includes "several homes", a "few commercial establishments", a "town hall"⁴, a "post office" and a "fire station" and a residential subdivision called "Hardwood Subdivision";
- Dunnigan has no school (the nearest school is 10 miles north in Arbuckle);
- New residents "would likely commute to Woodland or Sacramento"; and
- "Dunnigan lacks a focal point for the community".

See "Petition for Rulemaking" on the FCC's "RIPS" system, pp. 39-49.

13. Thus, Dunnigan has no local government, is unincorporated and therefore has no corporate boundaries, has no local school, and, according to Yolo County planners, "lacks a focal point for the community". Pursuant to Section 307(b) of the Act, FM channels must be allocated to

⁴It is unclear what, if any, activities take place in the "town hall", as Dunnigan is unincorporated and, as a result, has no town government.

a community. In **FM Table of Assignments, Coker, Alabama**, 43 Fed. Reg. 26082, 43 RR 2d 190, 193 (1978), the Commission defined a "community" as

a specific locality where residents share common interests. In the case of an unincorporated community, it is necessary to provide specific data which demonstrates that the businesses, organizations or services meet the needs of a recognizable group with common interests.

Where the petitioner could not show businesses or services specifically designed to meet the needs of a "community's" residents, the Commission refused to allocate an FM channel there; the Commission found that the petitioner failed to demonstrate that the place for which the allocation was sought was a community. **Coker, Alabama, supra; FM Table of Assignments, Naples, North Naples and Immokalee, Florida**, 42 Fed. Reg. 63887, 41 RR 2d 1539 (1977); **FM Table of Assignments, Vimville, Mississippi**, 48 Fed. Reg. 56613, 55 RR 2d 256 (1983).

14. In addition to petitioner's failure to show that Dunnigan is a community within the meaning of **Coker, Alabama, supra**, it would appear that the very definition of Dunnigan is nebulous. According to the Yolo County planning report, what is called Dunnigan is actually two separate places "with no focal point". According to said study, there is the "old town", and there is a residential subdivision called "Hardwood". To be charitable, the "old town" of Dunnigan, which is located on a road which used to

be called U. S. Highway 99W, has essentially dried up since the opening of Interstate Highway 5 over two decades ago. It is unclear whether the subdivision "Hardwood" has ever been a part of Dunnigan. A community is a specific place, not a "nebulous mass of unspecified territory". **Jupiter Associates, Inc. v. FCC**, 420 F.2d 108, 16 RR 2d 2120 (D. C. Cir. 1969). An applicant, once having named a "community", cannot then contend that it proposes to serve a "conglomerate of communities". **Five Cities Broadcasting Company**, 35 FCC 501, 1 RR 2d 279 (1963); **Southern Tier Radio Service, Inc.**, 19 FCC 496, 11 RR 143 (1954).

15. Thus, based on this record, the Commission cannot find that Dunnigan is a community for allocation purposes.

16. **Dunnigan Has Less Than 1,000 Persons and Cannot Receive a Section 307(b) Preference.** Even assuming *arguendo* the Commission were to find that Dunnigan is a community for allocation and licensing purposes, Dunnigan is not entitled to an "automatic" Section 307(b) preference for first local transmission service. The precedent in **Ruarch Associates**, 99 FCC 2d 338, 56 RR 2d 1593 (Rev. Bd. 1984), *affirmed*, 101 FCC 2d 1358, 58 RR 2d 1642 (1985). Therein, the Commission refused to award Edinburg, Virginia, population 752, a dispositive Section 307(b) first local transmission service preference *vis a vis* Woodstock, Virginia, a county seat of 2,627 persons. Indeed, the Commission, in footnote 10, 58 RR 2d at 1645, stated the rule that "communities" of less than 1,000 persons were not entitled to assignments; this

was because "favoring a second assignment to a large, dynamic community over a first assignment to a very small community is not inconsistent with [our] mandate to assign frequencies in a fair and efficient manner".

17. By population, Willows is approximately 8 times the size of Dunnigan. Dunnigan has a population of less than 1,000 persons. In view of **Ruarch**, it would do violence to Section 307(b) to remove Channel 288 from Willows and reallocate it to Dunnigan.

18. **The Instant Proposal Is an Impermissible Reallocation From a Rural Area to an Urban Area.** Even assuming *arguendo* that Dunnigan is a "community" for allocation and licensing purposes, and further assuming *arguendo* that Dunnigan could receive a Section 307(b) preference *vis a vis* Willows, the Commission has indicated that it was not its intention in permitting reallocations of FM channels from one community to another to permit the "shifting of service from an underserved rural to a well-served urban area". **Community Modifications II**, at ¶13.

19. In this case, proponents seek to reallocate KIQS-FM to a location in Yolo County, within the Sacramento MSA. The Sacramento MSA consists of Eldorado, Placer, Sacramento and Yolo Counties, and has a total 1990 Census population of 1,481,102.⁵ **Duncan's Radio Yearbook 1993**,⁶ at pp. 250-251,

⁵By county, Eldorado County, 125,995 persons; Placer County, 172,796 persons; Sacramento County, 1,041,219 persons; Yolo County, 141,092 persons. Source: **1990 Census of Population and Housing, Population and Housing**

reports that the Sacramento radio market has 30 operating stations, 17 FM and 13 AM (see Exhibit B). Of those, two are licensed to Yolo County communities: KSFM(FM), Woodland; and KYLO(FM), Davis.

20. This case presents the classic situation that the Commission sought to avoid: a migration from a underserved rural areas to a well-served urban area.⁷ Indeed, proponents seek to withdraw the only full-time radio station from Willows, an important county seat city in north central California, in favor of the Sacramento radio market. What makes this truly pernicious is proponents' use of Dunnigan, a place which lacks the attributes of a community for Section 307(b) purposes, to pull off this subterfuge. The above-entitled proposal cannot be granted. The public interest, convenience and necessity require that it be summarily denied.

Characteristics for Census Tracts and Block Numbering Areas, Sacramento, CA MSA, 1990 CPH-3-283.

⁶(Chantilly, VA: BIA Publications, Inc., 1993).

⁷Indeed, Commissioner James H. Quello, in a "Separate Statement" to ***Community Modifications II***, supra, wrote that "I dissented from the Commission's 1989 Report and Order in this proceeding because I was convinced that the new rule would encourage some licensees to abandon their assigned communities in favor of larger urban markets. The ensuing round of applications lent some credence to this concern. As a result, I am glad that, by this action, the Commission is taking steps to ensure that changes in a community of license will truly serve our allotment priorities and will not deprive communities of local service".

Conclusion

21. For all of the foregoing reasons, the above-captioned rule making proposal fails to serve the public interest, convenience and necessity. FM Channel 288 belongs to the people of Willows, California. It must not be reallocated to Dunnigan, a point within the Sacramento MSA without community attributes and to which no dispositive Section 307(b) preference can be accorded.

WHEREFORE, it is urged that the instant "Petition for Rulemaking" filed by KIQS, Inc. and supported by Pacific Spanish Network, Inc. **BE DISMISSED OR DENIED.**

Respectfully submitted,

KZSA BROADCASTING, INC.

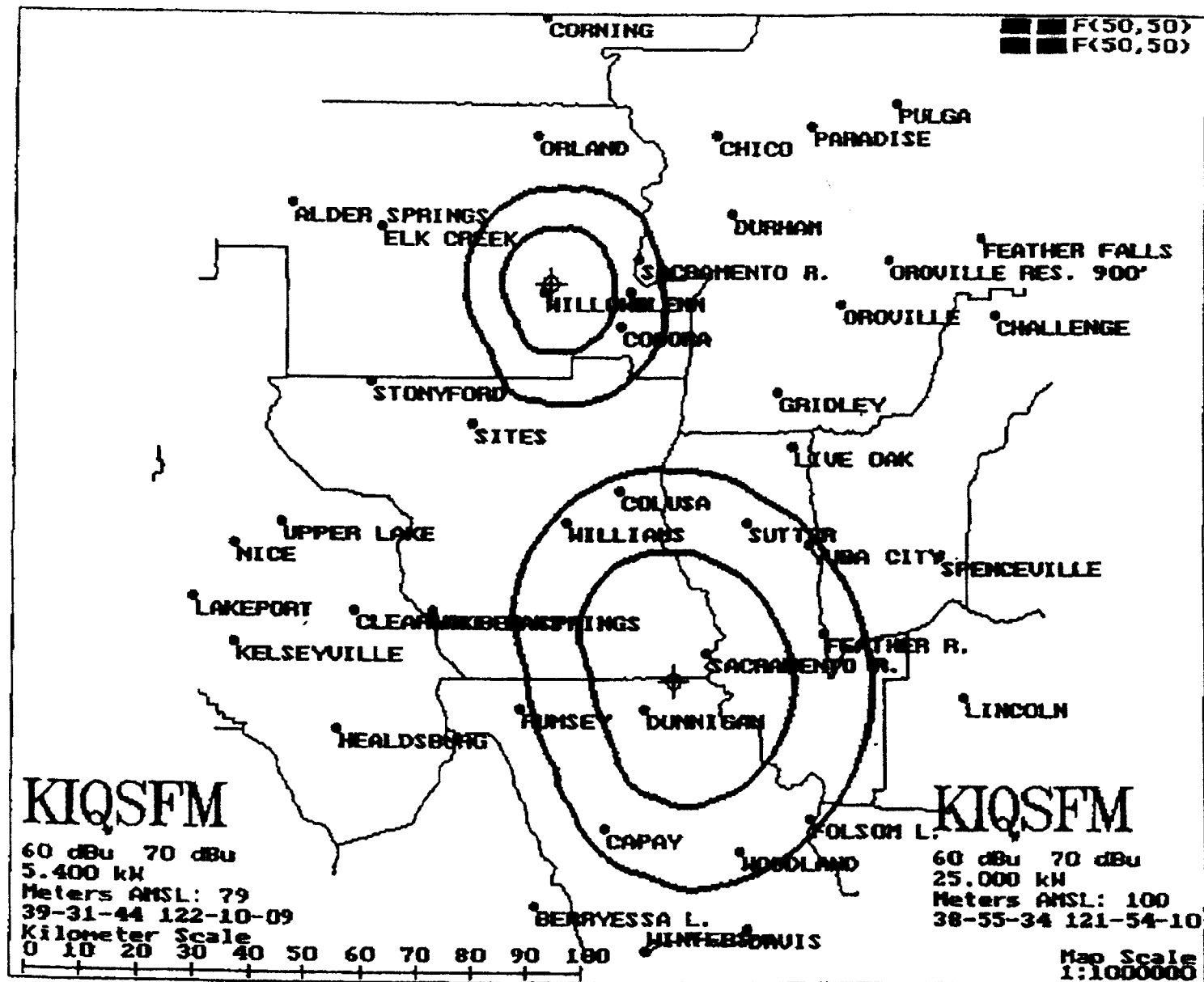
By 

Dennis J. Kelly
Its Attorney

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Telephone: 202-293-2300
410-280-6290

June 6, 1994

EXHIBIT A



MAY-12-94 THU 06:13 PM Z-SPANISH/KZSA
 LEE KHALID

10.001 916 677 9799
 CCG

EXHIBIT B

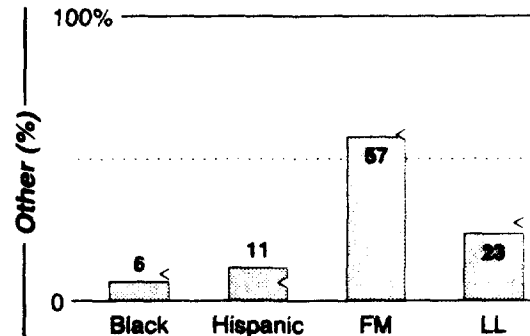
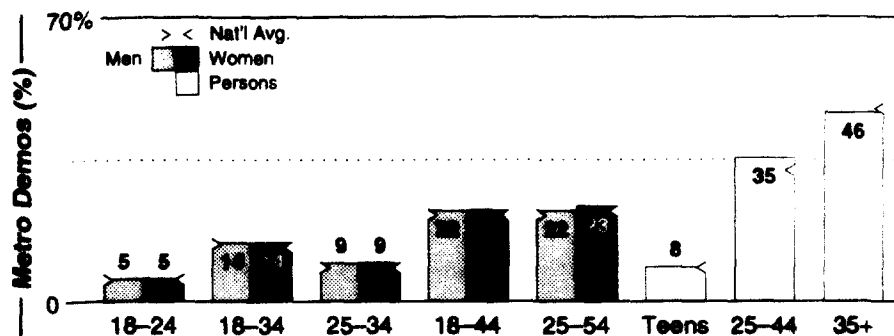
SACRAMENTO

Call	FM	City of License	Freq	PWR	HAA	Combs	MA	Reg	S	Owner	Alt	Class
KFIA	REL	Shingle Springs	101.9	4.1	827	d			89	Olympic Bcstrs, Inc.	9011	st
KGBY	AC	Sacramento	92.5	39.0	354	g		Grp W	46	Westinghouse Bcstg	8709	19,001 c1
KGLE	AC	S. Lake Tahoe	102.9	0.8 #	2937				66	Tri-Valley Bcstg	9201	550
KHYL	OLD	Auburn	101.1	36.3	577	a		Estmn	61	National Radio Ptnrs	9208	g3
KNCI	CTRY	Sacramento	98.5	50.0	500			McGvn	59	Nationwide Comm	8501	g
KQBR	CTRY	Davis	104.3	3.0 #	463		1	Katz	79	KYLO Radio Inc	9205	1,200
KQPT	ROCK	Sacramento	100.5	115.0	380			Torbt	58	Brown Bcstg Co	9302	7,000
KRAK	CTRY	Sacramento	105.1	50.0	500	c	1	Katz	60	EZ Communications	8610	g1
KRFD	AOR	Marysville	99.9	1.7	2182				47	River Cities Radio	7905	
KRLT	AC	S. Lake Tahoe	93.9	6.0	-187	i		K&P	76	Park Lane Group	9302	g4
KRXQ	AOR	Roseville	93.7	25.0 #	328	e		Torbt	70	Fuller-Jeffrey Group	8401	3,500 c2
KSEG	ROCK	Sacramento	96.9	50.0	500			Crstl	59	Great American Bcstg	8811	11,800
KSFM	CHR	Woodland	102.5	50.0	500	b		MMRS	61	Genesis Bcstg Co	8712	g2
KWOD	CHR	Sacramento	106.5	50.0 #	410			Hillr	57	Royce Intl Bcstg		
KXOA	OLD	Sacramento	107.9	50.0	402	f		Bannr	45	Brown Bcstg Co	7101	
KYMX	SAC	Sacramento	96.1	50.0	476	h		Crstl	47	Tribune Bcstg Co		
KZSA	SPAN	Placerville	92.1	1.4 #	472				82	Z Spanish Network	9302	400 p

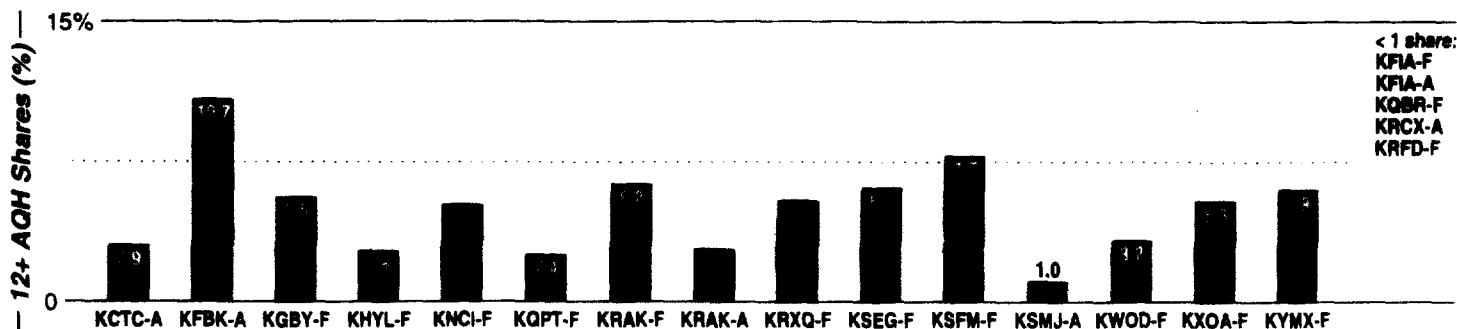
Call	FM	City of License	Freq	Day	Night	Combs	MA	Reg	S	Owner	Alt	Class
KAHI	CTRY	Auburn	950	5.4	4.40	a		Katz	57	National Radio Ptnrs	9208	g3
KCTC	EASY	Sacramento	1320	5.0	5.00	h		Crstl	45	Tribune Bcstg Co	7808	
KFBK	NEWS	Sacramento	1530	50.0	50.00	g		Grp W	22	Westinghouse Bcstg	8709	c1
KFIA	REL	Carmichael	710	25.0 #	0.50	d			79	Olympic Bcstrs, Inc.		
KJAY	REL	Sacramento	1430	0.5	0.00				63	Powell, Jack L	6512	
KKSA	DARK	Folsom	1030	50.0 #	1.00			Rosln	85	Folsom Radio Ltd	8612	al
KOWL	AC	S. Lake Tahoe	1490	1.0	1.00	i			56	Park Lane Group	9302	g4
KRAK	CTRY	Sacramento	1140	50.0	50.00	c	1	Katz	26	EZ Communications	8610	g1
KRCX	SPAN	Roseville	1110	5.0	0.50	e		Katz	68	Fuller-Jeffrey Group	8401	c2
KSAC	SPRT	Sacramento	1240	1.0	1.00			CMBS	37	Jonsson Comm Corp	7809	
KSMJ	OLD	Sacramento	1380	5.0	5.00	b		MMRS	52	Genesis Bcstg Co	8712	g2
KSTE	NEWS	Rancho Cordova	650	25.0	1.00	e		Katz	91	Fuller-Jeffrey Group	9212	1,314
KTHO	AC	S. Lake Tahoe	590	2.5	0.50				63	Grayghost Comm Inc	9301	450
KXOA	NEWS	Sacramento	1470	5.0	1.00	f		Bannr	45	Brown Bcstg Co	7809	

SACRAMENTO (Cont.)

Metro Rank: **28** Pop: **1,610,615** Retail: **\$12.376B** Gross Rev: **\$55.3M** HH Inc: **\$41,115 ↑**



Call	General Manager	Address, City, State, ZIP	Phone	Owner/Contact	Phone
KAHI	John Buckley	1230 High Street Suite 10, Auburn, CA 95603	916-885-5636	Alan Beck	516-475-5200
KCTC	Douglas Stewart	2225 19th Street, Sacramento, CA 95818	916-441-5272	Wayne Vriesman	312-222-3333
KFBK	Rick Eycheson	1440 Ethan Way, Sacramento, CA 95813	916-929-5325		212-307-3665
KFIA	Jamie Clark	5705 Marconi Ave., Carmichael, CA 95608	916-485-7710	Jamie Clark	916-485-7710
KGLE	Oliver Hayden	Box Am, South Lake Tahoe, CA 95705	916-542-5800	Craig Swope	
KJAY	Jack Powell	Box 1300, Sacramento, CA 95691	916-371-5101		
KNCI	Thomas Weidle	Box 15985, Sacramento, CA 95815	916-925-3700	Clark Pollock	614-249-7676
KOWL	Robert b. Good	P.O. Box 15460, South Lake Tahoe, CA 95702	916-541-6681	James Levy	415-324-8464
KQBR	Vernon Miller	Box 2980 Route 2, Davis, CA 95616	916-756-6800	Miklos Benedek	916-756-6800
KQPT	Henry Grambergu	10910 Olson Dr Bldg C, Sacramento, CA 95670	916-635-1005	Phil Melrose	916-923-6800
KRAK	Gary Brobst	1436 Auburn Boulevard, Sacramento, CA 95815	916-923-9200	Alan Box	703-591-1000
KRCX	David Burke	P.O. Box 417250, Sacramento, CA 95841	916-349-1100	Bob Fuller	916-791-3522
KRFD	Jeffrey D. Holden	Box 631, Marysville, CA 95901	916-742-5555	Arthur Hogan	916-742-5555
KSAC	Kenneth Jonsson	1021 Second St., Sacramento, CA 95814	916-446-2294	Kenneth A. Jonsson	310-451-3230
KSEG	Tom Schurr	620 Bercut Drive, Sacramento, CA 95814	916-446-5769	David Crowl	513-562-8000
KSFM	Jerry McKenna	1750 Howe Ave #500, Sacramento, CA 95825	916-446-2294	John L. Booth II	214-361-2932
KTHO	Oliver Hayden	Box AM, South Lake Tahoe, CA 95705	916-542-5800	Terry Hill	818-346-3930
KWOD	Edward Stolz	1425 River Park Dr., Sacramento, CA 95815	916-929-5000		
KXOA	John Geary	280 Commerce Circle, Sacramento, CA 95815	916-923-6800	Phil Melrose	916-923-6800
KZSA	Norm Hanning	200 Crestwood Lane, Folsom, CA 95630	916-621-0921		




CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing ***Comments in Opposition to Notice of Proposed Rulemaking*** were served by first-class United States mail, postage prepaid, on this 6th day of June, 1994, upon the following:

Arthur B. Goodkind, Esquire
Koteen and Naftalin
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Robert Lewis Thompson, Esquire
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A handwritten signature in black ink, appearing to read "D. Kelly", written over a horizontal line.

Dennis J. Kelly